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THE COURTS IN THE POLITICAL PROCESS: JUDICIAL ACTIVISM OR TIMID LOCAL GOVERNMENT?

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High school civics lessons taught us that the executive, legislative, and judicial branches form the basis of our system of government. Educators taught us that "separation of powers" meant that each branch had its own responsibilities to adhere to under the Constitution. The separation of powers doctrine provides that each branch does not usually interfere with its counterparts. The judicial branch, in particular, must avoid "political questions" and leave the administration of the law to the executive and legislative branches.[1]

However, reality is not this simple. Despite our civics lessons and our constitutional framework, the line separating the branches of government has become blurred, resulting in a serious erosion of the separation of powers doctrine. In many cases, separation between the branches seems to have disappeared entirely. For example, administrative agencies, the "headless fourth branch" of government, govern outside the standard three branch paradigm.

This article addresses a related phenomenon: the deliberate abdication of power by the political branches on difficult questions by forwarding matters to the judiciary for resolution. Specifically, I will examine the significantly increased role of an old device: the consent decree, a mechanism which allows parties in dispute to engage the court to administer and enforce settlement agreements. These decrees have been used by parties to settle disputes

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[1] *See* Colegrove v. Green, 328 U.S. 549, 556 (1946).

with the government regarding governmental administration. By empowering the courts to supervise and dictate governmental policy and operation, consent decrees have distorted the structure of government. Often, such extensive transfers of legislative and executive power to the courts represent a fundamental failure of these political branches to fulfill their responsibilities.

I. THE RISE OF NEW BRANCH POLITICS: PASSING THE BUCK

Beginning in the 1970's, a litigation explosion led to the expansion of rights that the judicial branch felt obligated to protect. These rights took on a life of their own[2] and courts fashioned new remedies and created new arrangements to settle grievances. If the political structure hesitated in responding to a grievance, the courts were only too eager to do so. In that age of judicial activism, political officials developed a "cover your backside" approach to politics.

The executive and legislative branches took the judiciary's invitation to use—and often abuse—the courts to solve their tough problems. This "politics of avoidance" allowed the executive and legislative branches to shirk their duties. While their words were bold, their deeds were timid, and their grand rhetoric created barren results. Whatever the issue—from discrimination to reapportionment of Congressional districts—the political actors were pleased to have the courts take up the matter and take the heat, which was traditionally part and parcel of the job in the political branches.

In many areas, New York City's (the "City") and New York State's (the "State") legislative and executive branches transformed their duties from determining and enforcing the law and Constitution to the task of framing questions for the courts to answer. They no longer decided many legal or constitutional issues for themselves. Instead, they referred them to the courts. Governor Mario Cuomo provides a telling, but by no means singular, example. Upon entering office, Governor Cuomo took the following customary oath of office:

[2] *See* WALTER K. OLSON, THE LITIGATION EXPLOSION *passim* (1991); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 1, 3 (1986).

> I do solemnly swear that I will support the Constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of Governor according to the best of my ability.[3]

However, in stark contrast to this oath, upon signing legislation creating state legislative districts, the Governor declared:

> It seems clear to me—and I believe it will be clear as well to other objective reviewers—that the Republican plan had as its primary concern the protection of incumbents against any real challenge. In doing so, I believe the Justice Department and the courts will both conclude that laws have been violated, despite the presumption of validity.[4]

This statement, along with his signing of the bill, clearly expresses the Governor's preference for the judiciary to decide legal issues for him.

A. The Litigation Explosion

The litigation explosion dramatically increased the judiciary's intrusion into what were traditionally political questions. The effect of this power shift has been a change in the way the State and City governments operate. While the effect on the roles of these political branches of government and the process of governing has been the most obvious, the substantive outcomes of significant public policy controversies have also been changed. In effect, while the legislature and the executive have spent more time on the *process* of government, they have had less of an *impact* on the results.

This outcome manifested itself in significant ways for the City and State of New York. Litigation, rather than legislation, determined significant policy changes such as whether construction of the federally funded Westway highway in Manhattan would be undertaken. As deadlines for the start of the project passed and litigation continued into the 1980's, much time and public expense

[3] N.Y. CONST. art. 13, § 1.

[4] Governor's Memorandum on Creation of New Legislative Districts, *reprinted in* [1992] N.Y. Laws 2874-76 (McKinney). The Governor's statement was made during the signing of legislation creating new legislative districts for the New York State Senate and Assembly. *Id.*; *see also* Kevin Sack, *In One Big Sweep, Albany Backs New Voting Laws and Districting*, N.Y. TIMES, May 5, 1992, at A1.

were wasted in the courts. The final result, as determined by the court, was the defeat of the Westway highway.[5]

More recently, when the State Consumer Protection Board objected to the Public Service Commission's grant of an electricity rate increase for Consolidated Edison, these State agencies litigated the matter in the State court.[6] In the end, *three* State agencies settled an issue uniquely suited for determination by *one* agency. Another example occurred when the legislature would not draw new congressional district lines under reapportionment in 1992. Two court plans were required to break the legislative log jam.[7] This demonstrated the legislature's abdication of a significant role to the judiciary.

B. The Expansive Role of the Judiciary

1. The Daily Management of New York City Jails

It is now clear to any student of state and local government that the courts are the locus where various disputes are settled because the political process has ceded its authority. New York provides abundant examples of this unfortunate situation. There has been so much judicial supervision in the daily management of New York City jails that one senior City official asserted that Judge Morris Lasker of the United States District Court for the Southern District of New York has been the actual Commissioner of Corrections for over fifteen years. In the face of what seems to be administrative incompetence, as well as a failure to observe basic standards of prisoner rights, Judge Lasker has had constant involvement through the implementation of the consent decree originally agreed to by the City in 1977.[8] His orders, pursuant to this decree, deal with the maximum population of the jails, the minimum space permitted for each prisoner, the extent of tele-

[5] *See* Sierra Club v. United States Army Corps. of Eng'rs, 481 F. Supp. 397 *passim* (S.D.N.Y. 1979); *see also* Sierra Club v. Hennessey, 695 F.2d 643, 644 (2d Cir. 1982); Action for Rational Transit v. West Side Highway Project, 536 F. Supp. 1225, 1228 (S.D.N.Y. 1982).

[6] *See* New York Consumer Protection Bd. v. New York Pub. Serv. Comm'n, 85 A.D.2d 321, 323, 449 N.Y.S.2d 65, 67 (3d Dep't 1982).

[7] *See* Puerto Rican Legal Defense & Educ. Fund v. Gantt, 796 F. Supp. 681 *passim* (E.D.N.Y. 1992); Reid v. Marino, No. 92-9567 (N.Y. Sup. Ct. Kings County June 8, 1992).

[8] *See* Rhem v. McGrath, 326 F. Supp. 681, 681 (S.D.N.Y. 1974).

phone service and laundry facilities, and the quality of food,[9] among other items.

In New York City, the consent decree apparatus is so extensive and expansive that the courts often function as a counterbalance to the democratic process of electoral politics. Despite the wisdom of their decisions, the fact remains that judicial decisions are made because the traditional political process has failed. The New York City Council and Mayor are required to consider the financial obligations of the city in significant areas of government because the courts have defined basic municipal obligations. Whether it is the environment, housing discrimination, education, homelessness, treatment of the mentally ill, or prisoners' rights, the judicial role in the recent past has been enormously enhanced as the political branches of government have ceded their responsibilities to "higher authority." Such a situation places certain municipal and state duties above other duties because of legal entitlements that have been defined through the device of consent decrees. The result is the erosion of government autonomy in the face of a new type of entitlement. Decisions are taken away from those to whom power is appropriately vested. The situation perpetuates the lack of confidence in government and, therefore, the governmental process falters.

2. The Lack of State and Local Autonomy

Consent decrees have become the most formidable mechanism for the recent enhancement of judicial power at the expense of local and state autonomy. Although the consent decree has been employed since 1859,[10] its use emerged in the 1930's and increased substantially in the 1970's. Initially, judges used consent decrees to combat the cost and inflexibility of court judgments. Their suitability to more agreeable remedies made them useful for antitrust litigation in particular.[11] Today, the use of consent de-

[9] *See generally* Rhem v. Malcolm, 432 F. Supp. 769 *passim* (S.D.N.Y. 1977) (examining constitutionality of conditions of confinement); Rhem v. Malcolm, 396 F. Supp. 1195 *passim* (S.D.N.Y.) (same), *aff'd*, 527 F.2d 1041 (2d. Cir. 1975); Rhem v. Malcolm, 389 F. Supp. 964 *passim* (S.D.N.Y. 1975) (same); Rhem v. Malcolm, 377 F. Supp. 995 *passim* (S.D.N.Y. 1974) (enjoining defendants from confining anyone after specified date because of refusal to cure conditions).

[10] *See* United States v. Peralta, 27 F. Cas. 502 (N.D. Cal. 1859). This was the earliest decision using a consent decree.

[11] Since before the turn of the century, consent decrees were used in a wide variety of circumstances and often the underlying case was complicated. *See, e.g.*, McGowan v. Par-

crees has expanded considerably. They are commonly employed to effectuate institutional and criminal justice reform; resolve environmental disputes; and resolve disputes involving school, housing, and employment discrimination.

Consent decrees are actually settlement contracts, containing injunctive relief, formulated and implemented under the supervision of the trial court. In contrast to private settlements, which remain under the exclusive control of the parties to the agreement, a trial court maintains continued jurisdiction over a consent decree. This places the court in the role of watchdog and mediator. In effect, the consent decree embodies an admission by the parties that the settlement reached is a just determination of their rights, made under the sanction of the court. It is useful when the required remedy will take time to implement. The typical consent decree will include a statement of facts and goals, a statement of obligations and deadlines, reporting requirements, exchange of information agreements, monitoring procedures, and extrajudicial enforcement mechanisms such as review panels.

II. THE CONSENT DECREE IN ACTION: EXAMPLES OF FAILURE

Consent decrees contain elements of contract and judicial action. Two events are necessary to create a consent decree. First, settling parties must submit a proposed agreement to the court. Next, the court endorses the parties' agreement, thereby rendering it a true hybrid of contract and judicial act. While this may sound straightforward, consent decrees present the courts with several problems, including: whether the court should approve the consent decree, whether the decree is a fair and effective means of settling a dispute, whether the parties are meeting their obligations under the decree, and the attendant problem of permitting decree modification in the event the agreement is ineffective.

ish, 237 U.S. 285, 290-91 (1915) (consent decree concerning legal fees, in case involving claim for ice service provided to government in 1863); Nashville C. & St. Louis Ry. Co. v. United States, 113 U.S. 261, 262-65 (1884) (consent decree entered into for bill for mail services rendered before Civil War); Garrett & Co. v. Sweet Valley Wine Co., 251 F. 371, 374 (N.D. Ohio 1918) (consent decree used in trademark dispute). Consent decrees were also relied upon by the government in their prosecution of antitrust cases. *See* William J. Donovan & Breck P. McAllister, *Consent Decrees in the Enforcement of Federal Anti-Trust Laws*, 46 HARV. L. REV. 885, 887, 911-12 (1933); *see also* United States v. Swift & Co., 286 U.S. 106, 108-11 (1932); Swift & Co. v. United States, 276 U.S. 311, 320 (1928).

The consent decree forces the court to assume an unfamiliar role. The judge must remain involved enough to *discharge* the parties' obligations while remaining detached enough to allow others to *discharge* their duties. In such a situation, the courts become politically vulnerable. Faced with standards of judicial behavior that limit their ability to comment on their own cases, judges are inherently limited in their ability to defend their decisions. Moreover, to the extent that the courts are drawn into controversies, judges are forced to expend political capital because of the media coverage and public debate surrounding many consent decrees.

Over time, courts, including the United States Supreme Court, have struggled with how to define the appropriate judicial role when a consent decree is made. During the period of judicial activism encouraged by the Supreme Court under Chief Justice Earl Warren's tenure, courts saw their roles expand and they accepted broader responsibilities. More recently, however, the Supreme Court under Chief Justice William Rehnquist has acknowledged the adverse effects of judicial activism. One area of this recognition has concerned consent decrees.

A. *The Supreme Court's Use of Consent Decrees*

In 1992, the United States Supreme Court held, in *Rufo v. Inmates of Suffolk County Jail*,[12] that greater authority should be given to the court to modify a consent decree where it has an impact upon local government.[13] Justice Byron White reasoned that the increase in the number and duration of consent decrees required a more flexible approach to reform.[14] Particularly important, the Court noted, was the public's interest in the sound and efficient operation of its governmental institutions. The Court explained that efficient government is subverted by an intrusive role for courts.[15] The upshot of *Rufo* is that the Supreme Court should look more favorably upon local governments which seek to reform consent decrees on the basis of local government need.

The *Rufo* decision also illustrated the danger accompanying the binding nature of consent decrees on the political process. In par-

[12] 112 S. Ct. 748 (1992).
[13] *Id.* at 758.
[14] *Id.*
[15] *Id.* at 759.

ticular, the Court reasoned that one city administration should not necessarily be tied by actions of a preceding administration. The general notion of citizens being able to alter governmental policies by voting in new administrations is significantly subverted by judicial consent decrees which may carry on for years without formal adjudication. Indeed, in New York City, New York Supreme Court Justice Helen E. Freedman threatened to personally punish members of the Dinkins administration, including First Deputy Mayor Norman Steisel, for not complying with agreements made by the prior administration.[16] In *Rufo*, the Supreme Court allowed a challenge to the policies of a predecessor administration by providing the current administration an opportunity to prove a change of circumstances and facts.[17] Such an invitation allows the executive and legislative branches of local government to meet their legal responsibilities. The Supreme Court decision offers some reassurance in light of the significant problems that have occurred with consent decrees. It is reassuring, however, only if elected officials are willing to deal with the issues that have been given over to the courts.

B. Failed Uses of Consent Decrees in New York City

In New York City, legislators and executives continue to circumvent their responsibilities. Thus, the consent decree increasingly becomes the basis for municipal government policy. Such abdication by political actors carries severe financial implications for New York City's taxpayers. In terms of local tax dollars, the most costly consent decrees appear to involve environmental issues. While federal environmental regulation has been extensive, regulators and advocates have relied heavily on the courts to implement certain standards.

1. The Sewage Treatment Debate

In the area of sewage treatment, the consent decree became the vehicle for implementing federal pure water standards with which, by the City's admission, it had failed to comply. A North River Sewage Treatment Plant was first proposed in 1941. It was

[16] Celia W. Dugger, *Four Dinkins Officials Found in Contempt on Housing Delay*, N.Y. TIMES, Nov. 21, 1992, at A1.
[17] *Rufo*, 112 S. Ct. at 760.

to treat more than 170 million gallons of raw sewage that the City was dumping into the Hudson River. Remarkably, the plan was left virtually unattended until a consent decree was entered into in 1977, and then modified in 1979.[18] The consent decree established a timetable for the completion of the sewage treatment facility by 1987. The same delay in the City's schedule occurred in Red Hook, Brooklyn, where the construction of a similar facility was delayed for over ten years.[19]

2. Ocean Dumping of Solid Waste

The sewage treatment decrees are complemented by consent decrees governing ocean dumping of solid waste. On December 7, 1987, New York City signed a consent decree with Woodbridge Township, New Jersey, to prevent garbage generated in New York City from polluting the New Jersey shoreline.[20] The decree provided for harsh penalties if the City failed to meet timetables for installing pollution control equipment in New York City Harbor waste transfer and disposal facilities. The City was also subject to a fine of one million dollars and additional penalty payments to cover the cost of cleaning up the Woodbridge waterfront area. In addition, the decree called for the appointment of a special master to supervise the construction of the landfill at Fresh Kill and the creation of a twenty-four hour water monitoring team.

While the consent decree addressed environmental concerns, and perhaps implemented the relevant laws, this "environmental policy" was created by a court and not the environmental agencies affected. Once again, a consent decree was used to avoid political costs and detracted from the effectiveness of the executive branch. Although the ocean dumping issue has not generated headlines, it is only a matter of time before the issue re-emerges, for the City is currently permitted to dump in violation of federal standards only because it has negotiated by consent decree to continue this dumping through 1998. Moreover, the City's solid waste disposal program calls for an end to dumping at the City's last landfill in Staten Island. The inability of the City Council and the hesitancy of the mayor's office to provide for incinerator plants or reasonable

[18] United States v. New York City, No. 77 Civ. 76 (S.D.N.Y. filed January 7, 1977).
[19] United States v. New York City, No. 77 Civ. 2290 (S.D.N.Y. filed May 11, 1977).
[20] United States v. New York City, No. CV-89-2571 (E.D.N.Y. filed August 4, 1989).

alternatives to deal with solid waste leaves the prospect of judicial intervention a near certainty. As the deadlines draw near, the City's approach may ultimately be not the construction of adequate and appropriate solid waste facilities, but the further extension of its failure to comply with federal standards.

3. Housing Discrimination

The process of governance by consent decree is not a simple one, and is made even more complex when there are private parties who have adverse and competing interests. The City's handling of housing discrimination in the public housing facilities of Williamsburg, Brooklyn is a case in point. In this section of Brooklyn, the Satmar Hasidic Jews, Latinos, and African-Americans compete for limited public housing. The Latino and African-American communities believe that the Satmar have achieved great success in securing housing in these projects at their expense. Frustrated by the unresponsiveness of the New York City Housing Authority, advocates representing each of these groups turned to the courts.

In 1976, a class action suit was filed by Brooklyn Legal Services and the Williamsburg Fair Housing Committee, two public interest groups concerned with fair housing issues.[21] The suit alleged that racial quotas were used to determine the occupancy of apartments in public housing projects and privately owned federally subsidized housing developments.[22] Judge Charles H. Tenney of the United States District Court for the Southern District of New York held that the management of these 3,000 apartments violated the Fair Housing Act of 1968.[23]

Within two years, relief was granted in the form of a consent decree to which all the parties agreed, with the exception of one defendant.[24] The overall plan described in the consent decree was unambiguous. Quotas were to be abandoned and, as a remedial measure, an affirmative rental plan was put into effect until mi-

[21] *See* Williamsburg Fair Hous. Comm. v. New York City Hous. Auth., 450 F. Supp. 602 (S.D.N.Y. 1978).

[22] *Id.* at 603. Defendants in the suit were the New York City Housing Authority, the United States Department of Housing ("HUD"), two private management companies (Kraus Management, Inc. and Ross-Rodney Housing Corp.), and the United Jewish Organizations of Williamsburg ("UJO") as an intervenor-defendant. *Id.* at 603. UJO alleged that the use of the quota system had denied apartments to white applicants. *Id.* at 603.

[23] *Id.* at 606; *see also* Fair Housing Act of 1968, 42 U.S.C. § 3601 (1988).

[24] *Williamsburg*, 450 F. Supp. at 603. The only defendant who refused to sign the consent decree was Kraus Management, Inc. ("Kraus"). *Id.*

nority tenants occupied fifty percent of the apartments in each development. An eighteen month adjustment period was created to assure that minority representation in the apartments be brought up to thirty-two percent. Rentals of vacated apartments to minorities were to be increased to fifty percent until the goals of the consent decree were reached. Additionally, the United Jewish Organizations of Williamsburg agreed to make efforts to persuade at least twenty white families to vacate their units and move to Roberto Clemente Plaza, a predominantly Latino and African-American housing complex.

Compliance with the decree was also expressly specified. The consent decree provided that objective, nonracial and reviewable rental standards and procedures were to be prepared by the management companies and approved by a committee made up of representatives for the plaintiffs, the government agencies that were parties in the suit and the United States Department of Justice. Detailed monthly compliance reports including the status of rental units in each development and a description of each waiting list including information on race, national origin, and priority were to be forwarded to committee members.

Any complaints about the defendants' rental choices were to be directed to the New York City Housing Authority ("NYCHA") or the New York City Housing and Development Administration for investigation. The findings of these investigations were to be reported in writing to the review committee. The federal courts retained jurisdiction and Judge Tenney reserved the authority to modify or add to his decree. Despite the consent decree, in 1989 Brooklyn Legal Services and the Puerto Rican Legal Defense and Education Fund filed a contempt motion, charging that the NYCHA violated the 1978 court order by failing to integrate the housing projects as required by the agreement.[25] The parties agreed to a new decree in 1991. Once again a consent decree forbade the use of quotas but, instead of relying on percentage agreements, it called for the next 190 vacancies in three public developments, the Taylor-Wythe Houses, Jonathan Williams Plaza and Independence Towers, to be filled by minority residents. They were to be selected from a list of people interviewed for public

[25] Contempt Mot., Williamsburg Fair Hous. Comm. v. New York City Hous. Auth., 450 F. Supp. 602, 605 (S.D.N.Y. 1978) (76 Civ. 2125).

housing between 1980 and 1988, which is when the discrimination occurred.[26]

This remedy was necessary because the executive branch and legislature failed to address the issue and the judiciary considered the inaction as an invitation to intervene. The fiscal impact associated with this thirteen year controversy, in terms of attorney's fees and court costs borne by the government, could have funded the construction of many new units.

In 1992, New York City admitted that it engaged in citywide discrimination when assigning tenants to public housing. The delays in obtaining this admission are indications of the reluctance of political officials to undertake their own assessment of the legal or constitutional issues they face. In effect, notwithstanding federal findings as far back as 1983 and state findings as far back as 1986, the City continued a systematic pattern of racial steering of applicants for public housing. The City's administration did not recognize its constitutional and legal duties until it was mandated by the court to recognize them.

Proponents of consent decrees argue that government reform in similar cases will not occur if left in the hands of the legislature or recalcitrant bureaucrats. Perhaps this is true. However, when litigation costs often exceed the costs of plaintiff's original needs, it is time to examine other means for insuring protection of New York's under-represented interest groups. This could possibly include means that might result in personal liability for public officials.

4. Bilingual Education

There are other ways in which the remedy fashioned by the courts is unsatisfactory. While the courts may adequately carry out their traditional judicial functions, they are not able to hear evidence on policy, as may the legislature. Furthermore, courts are constrained by legal rules. Nowhere is this more clear than in issues concerning education. In the area of bilingual education, the New York City public school system has struggled with consent decree activity that has distorted the basic purpose of providing an appropriate and effective education for students whose sec-

[26] ASPIRA of New York, Inc. v. New York City Bd. of Educ., 79-CV-270 (S.D.N.Y. filed April 17, 1991).

ond language is English. The basis for legal action was the Bilingual Education Act of 1968,[27] the first federal legislation to focus exclusively on non-English speaking children.

The Puerto Rican Legal Defense and Education Fund, on behalf of ASPIRA, a private advocacy group working on behalf of the Hispanic community, brought a class action suit against the New York City Board of Education in the name of the Spanish-speaking school children who were deprived of their right to equal educational opportunities.[28] A consent decree was entered and filed on August 29, 1974 by Judge Marvin E. Frankel of the United States District Court for the Southern District of New York.[29] The decree stated that by September of 1975, the Board was to provide "a planned and systematic program designed to develop the pupil's ability to speak, understand, read and write in the English language."[30] The decree affected all Spanish-speaking and Spanish-surnamed New York City public school pupils whose English language deficiency prevented them from effectively participating in the learning process.

In retrospect, it is clear that the plan was likely to be unattainable within the time frame specified. As a result, the City's school system was continually placed on the defensive for failing to meet the plan's deadlines.[31] Additionally, the implementation of the program suffered since an overwhelming number of educators believed that the program called for in the decree actually defeated the very purpose of the educational system. Educators viewed the program as grounded in politics rather than in education. While there are exceptions to this in a few bilingual efforts, the case illustrates a basic problem with the judiciary setting a program in motion. Decisions are taken away from those usually responsible for them, leaving the judiciary wedded to the implementation of the plan, even when the plan increasingly appears questionable.

[27] Pub. L. No. 90-247, § 701-6, 81 Stat. 816 (1968).

[28] ASPIRA of New York, Inc. v. New York City Bd. of Educ., (72 Civ. 4002) (S.D.N.Y. filed August 29, 1974).

[29] *Id.*

[30] ASPIRA of New York, Inc. v. New York City Bd. of Educ., 394 F. Supp. 1161, 1162 (S.D.N.Y. 1975).

[31] The plaintiffs went before Judge Frankel on several occasions seeking contempt orders against the Board of Education for its alleged failure to adhere to the deadlines contained in the original consent decree. *See, e.g.*, ASPIRA of New York, Inc. v. New York City Bd. of Educ., 423 F. Supp. 647 (S.D.N.Y. 1976); ASPIRA of New York, Inc. v. New York City Bd. of Educ., 65 F.R.D. 541 (S.D.N.Y. 1975); ASPIRA of New York, Inc. v. New York City Bd. of Educ., 58 F.R.D. 62 (S.D.N.Y. 1973).

This allows the decree to take on a life of its own, often proceeding in a policy direction which moves away, rather than toward, the goal the consent decree is designed to meet.

The ASPIRA decree also invited the classroom to be the focus of political contention. The professionals ceased thinking about the students' welfare. Instead, they felt that the issue was removed from their sphere of concern. Finally, when pressed about who would teach in this program, the school system admitted it was unable to supply enough professionals capable of delivering the services under the terms of the consent decree. Again, entering into decrees without sufficient resources to comply with even their short-term requirements hardly appears a reasonable way to resolve a problem.

The fundamental wrong with such intrusions into the public schools is that they form the basis for school officials to excuse their obligation to school children. The movement toward effective education flies directly in the face of federal law and regulation in bilingual education.[32] Effective child-centered theories of education minimize the differences among children. This logic was the foundation for the Supreme Court's decision in *Brown v. Board of Education*[33] that "separate but equal" was inherently unequal.[34] A consent decree, such as this one, is educationally harmful because it justifies isolating youngsters from the mainstream and excusing the bureaucracy from providing children with a sound education. In essence, even if the consent decree could be complied with, it would not result in an improvement in education.

5. The Homeless Debate

Still another area where consent decrees have resulted in rule by the judiciary involves the homeless. The right of the homeless to private shelters has been judicially fashioned and has developed into a legal entitlement, although not a constitutional one. In *Callahan v. Carey*,[35] six homeless men on behalf of themselves and those similarly situated, challenged the sufficiency and qual-

[32] It should not be forgotten that effective education must also be provided to handicapped children.
[33] 347 U.S. 483 (1954).
[34] *Id.* at 495.
[35] N.Y.L.J., Dec. 11, 1979, at 10, col. 5 (Sup. Ct. N.Y. County 1979).

ity of homeless shelters in New York City.[36] The plaintiffs brought the suit against the Governor of New York State, Mayor of New York City, and other state and local officials.

On August 26, 1981, the parties agreed to a consent decree to settle the following issues: providing shelters for homeless men; the standards and qualities of those shelters; intake centers; community participation on sheltering homeless men; information dissemination; and the monitoring of City compliance with the consent decree.[37] In part, the decree required New York City to provide clean and safe accommodations to every homeless man who sought shelter. The agreement did not force the City to open community shelters as originally sought by the plaintiffs. Under the agreement, each shelter must provide clean towels and linens weekly, lockable storage units, showers and pay telephones, overnight security guards at identified facilities, and recreational activities. The City was also ordered to open an armory or other new facility for homeless men by October 21, 1981.

This decree led to many repeated trips before the New York State Supreme Court for both sides.[38] Homeless advocates claimed that the City did not comply with the original decree. Similarly, the City sought to have the original decree modified due to the recession and budget constraints. The City also claimed that the decree actually hampered its ability to provide necessary services to the homeless.

In February of 1983, the terms of the 1981 consent decree were applied to shelters for homeless women. Justice Arnold G. Fraiman of the New York State Supreme Court for the County of New York called a claim by four homeless women seeking the

[36] *Id.*

[37] *Id.*

[38] *See, e.g.*, Weiser v. Koch, 632 F. Supp. 1369, 1377 (S.D.N.Y. 1986); Canaday v. Koch, 608 F. Supp. 1460, 1473 (S.D.N.Y. 1985); Canaday v. Koch, 598 F. Supp. 1139, 1145 (E.D.N.Y. 1984); Slade v. Koch, 135 Misc. 2d 283, 290, 514 N.Y.S.2d 847, 852 (Sup. Ct. N.Y. County 1987); Lamboy v. Gross, 129 Misc. 2d 564, 571-72, 493 N.Y.S.2d 709, 714-15 (Sup. Ct. N.Y. County 1985); Wilkins v. Perales, 128 Misc. 2d 2365, 2368, 487 N.Y.S.2d 961, 964 (Sup. Ct. N.Y. County 1985); McCain v. Koch, 127 Misc. 2d 20, 20, 484 N.Y.S.2d 982, 983 (Sup. Ct. N.Y. County 1985); McCain v. Koch, 127 Misc. 2d 23, 23, 484 N.Y.S.2d 985, 986 (Sup. Ct. N.Y. County 1984); New York City v. Blum, 121 Misc. 2d 982, 983-84, 470 N.Y.S.2d 308, 311-12 (Sup. Ct. N.Y. County 1983).

same rights granted to homeless men in 1981, "so obviously meritorious that it scarcely warrants discussion."[39]

As recently as 1987, a New York State Supreme Court upheld the decree.[40] An examination of the adequacy of these shelters, however, posits the question whether court intrusion has actually resulted in improved conditions for the homeless. The City's bureaucrats are in a defensive posture, trying to catch up to mandates they previously agreed to meet even though it was known at that time they would be virtually impossible to meet.[41] The advocate's strategy is to use the consent decree mechanism for incremental improvement. While the courts continue to play a role in the process, targets are specified and not met because they are unattainable, because of bureaucratic resistance, or because of inherent unattainability.

6. Facilities for the Mentally Handicapped

Consent decrees are often virtually endless. The closing of one facility for the mentally disabled resulted in almost two decades of court scrutiny. In April of 1975, Governor Hugh Carey signed a consent decree ("1975 agreement") to reduce overcrowding at the Staten Island Willowbrook Development Center ("Willowbrook Center").[42] Under the consent decree, patients were to be placed in group homes and other community facilities.[43] In 1979, however, under constituency pressure, the State legislature terminated funding for a review panel charged with implementing the 1975 agreement because constituent groups did not want the mentally handicapped persons or group homes in their neighborhoods.

The 1975 agreement set April 30, 1982, as the deadline for the State to reduce the Willowbrook Center population to 250 patients. Judge John R. Bartels of the United States District Court

[39] *See* Eldredge v. Koch, 118 Misc. 2d 163, 163-64, 459 N.Y.S.2d 960, 961 (Sup. Ct. N.Y. County 1983) (finding showers and toilets must be installed at two womens' shelters at City's expense).

[40] Thrower v. Perales, 138 Misc. 2d 172, 176, 523 N.Y.S.2d 933, 936 (Sup. Ct. N.Y. County 1983) (pointing out statutory law and legislature have not spoken on issue, but rather court did in *Callahan* consent decree).

[41] Indeed, part of the strategy from the government agencies' perspectives in agreeing to consent decrees appears to be buying time. *See* Sutton Area Community v. New York City Bd. of Estimates, 165 A.D.2d 456, 460, 568 N.Y.S.2d 35, 37 (2d Dep't 1991) (discussing government delay in construction concerning waterway).

[42] New York State Ass'n for Retarded Children v. Carey, 393 F. Supp. 715, 717 (E.D.N.Y. 1975).

[43] *Id.* at 718.

for the Eastern District of New York, ruled that the State was not complying with the 1975 agreement.[44] The Willowbrook Center was placed in the hands of a special master in order to achieve compliance with the 1975 agreement. Not until March of 1987 did Judge Bartels finally approve a settlement for Willowbrook. The terms of the settlement were met six years later in March of 1993.

What often makes consent decrees attractive to litigants is the way in which the costs of these claims are met. During the 1970's, Congress sought to encourage the policing of administrative agencies by "citizen suits." Congressional statutes in the environmental and civil rights areas liberalized standing requirements, thereby making it easier for concerned groups to sue government and private entities. Congress also mandated that unsuccessful defendants in such suits pay for plaintiffs' attorney fees. In the case of consent decrees, this means that plaintiffs' attorneys can be awarded fees for the life of the decree if the need for modification arises. Fees generated by such suits can be considerable. For example, in *New York State Association for Retarded Children v. Carey*,[45] the court awarded $613,992 to plaintiff's counsel. Thus, added to the attorney fees for the City and State were the legal fees necessary to represent the plaintiffs.

7. The New York City Police Department

The problems surrounding the use of consent decrees have even affected the New York City Police Department's surveillance procedures which have been constantly monitored by the courts. In 1985, the City entered into a consent decree settling a claim that charged the City's police with violating the civil rights of politically active groups and individuals.[46] The terms of the agreement allowed the police to investigate the political activities of individuals or groups only if they had specific information that the targets

[44] *See generally* New York State Ass'n for Retarded Children v. Carey, 551 F. Supp. 1165, 1177 (E.D.N.Y. 1982), *aff'd*, 727 F.2d 240 (2d Cir. 1984); New York State Ass'n for Retarded Children v. Carey, 544 F. Supp. 330, 343 (E.D.N.Y.), *rev'd*, 711 F.2d 1136 (2d Cir. 1982); New York State Ass'n for Retarded Children v. Carey, 492 F. Supp. 1099, 1103 (E.D.N.Y. 1980); Society for Good Will to Retarded Children v. Carey, 466 F. Supp. 722, 729 (E.D.N.Y. 1979); New York State Ass'n for Retarded Children v. Carey, 456 F. Supp. 85, 87 (E.D.N.Y. 1978); New York State Ass'n for Retarded Children v. Carey, 438 F. Supp. 440, 442 (E.D.N.Y. 1977).

[45] 393 F. Supp. 715 (E.D.N.Y. 1975).

[46] Handschu v. Special Serv. Div., 605 F. Supp. 1384, 1388 (S.D.N.Y. 1985), *aff'd*, 787 F.2d 828 (2d Cir. 1986).

were engaged in, about to engage in, or threatened to engage in criminal activity.

In July of 1989, Judge Charles S. Haight Jr. of the United States District Court for the Southern District of New York ruled that the New York City Police Department violated the 1985 consent decree which placed limits on police surveillance techniques.[47] Judge Haight explained that monitoring and taping the views expressed on a radio station in New York City did not meet the court approved standards.[48] The court further held that the police violated the guidelines established in 1985 when undercover police officers attended meetings of various politically active groups.[49]

III. The Compromise for the Political and Judicial Systems

Although court intervention is often necessary, one must be concerned with this apparent trend because consent decrees are unhealthy for the political system. The use of consent decrees underscores the failure of the executive and legislative branches of government to meet their basic obligation to make and enforce law and adds greatly to the cost of government. From the standpoint of the judiciary, it perverts the very nature of the judicial process. The consent decree process relies on the court's active participation throughout the process. Diverse parties must depend solely on the judge to sift through a myriad of facts and considerations to make determinations that a proposed decree is fair and workable, that the terms ultimately have been met or that a modification is justified. Without the benefit of a judicative process to help eliminate inconsistencies, or the resources which an administrative staff could provide, the judges who must decide some of our most pressing social issues bear an enormous burden.

Without question, consent decrees have imposed new costs and time pressures on our already overburdened court system. More than time, however, is at issue. For some, consent decrees present troubling doctrinal issues. The court is actually superseding its role and interfering with the everyday workings of the democratic

[47] Handschu v. Special Serv. Div., 737 F. Supp. 1289, 1309 (S.D.N.Y. 1989) (holding that New York City violated decree but not held in contempt of court).
[48] *Id.*
[49] *Id.*

process. Judge Malcolm Wilkey of the United States Court of Appeals for the District of Columbia Circuit was one of the first judges to speak out against the use of the consent decrees in social reform litigation. His dissent in *Citizens for a Better Environment v. Gorsuch*[50] argued that consent decrees freeze democratic regulatory processes in areas such as environmental litigation[51] and replace these processes with the actions of a branch of government not intended or equipped to accommodate the wide range of interests affected by a decree.[52]

Those opposed to the use of consent decrees accurately point out that the decrees may encourage the formation of *sub rosa* alliances between public bureaucrats and special interests. In this scenario, agency administrators leave their budget battles to public interest groups who bring suits and push for court-ordered decrees. When a decree is entered, the agency administrator has a potent and usually highly publicized bargaining chip with which to force increased budget allocations from the legislature.

Critics also observe that consent orders are often negotiated in private between bureaucrats and organizations charged with violating laws, such as those involving environmental regulations. In such cases, there is selective enforcement of breaches of law or decree. A new private law enforcement system is created. Government bureaucrats in New York City often relish the benefits that consent decrees provide their agencies. On a less theoretical level, "government by consent decree" engenders shortsighted and piecemeal policy making. Such a knee-jerk approach disregards the need to balance claims of other interest groups with equally legitimate needs. The consent decree virtually ignores the uncertainties of the future by locking government into static policies of bygone administrations.

In addition, consent decrees change the priorities of an agency's budget and staff resources. In order to comply with a consent decree affecting only one policy, agencies can be forced to reduce services to other clients who are equally entitled to these resources, or lobby the fiscally-strapped legislature for additional funds taken either from taxpayers or appropriations earmarked

[50] 718 F.2d 1117 (D.C. Cir. 1983).
[51] *See id.* at 1126 (stating public often is overlooked as victim of consent decree).
[52] *Id.* at 1136 (Wilkey, J., dissenting).

for other government services. Nowhere has this been more prevalent than in the area of education, where mandates, often derived from consent decrees, result in diminished services in the classrooms of "ordinary" and not specially protected students.

The longterm impact consent decrees have on an agency becomes magnified when the social problems which prompted the decree have been underestimated or not fully anticipated by the administrator who originally agreed to the terms of the decree. This is illustrated in *Callahan v. Carey*.[53] In *Callahan*, the evolving problem consistently outran the solution. As the problem grew, the resources pledged became unsatisfactory and the situation was compounded by a problem that was inadequately and inappropriately defined. The providers actually came to resent the claimants who were bombarded with political rhetoric about their oppression.

An additional problem with reliance on consent decrees is that resorting to the courts often results in political backlash against claimants. As a result, the decree becomes a far less effective means of affecting long term social reform for the proponents. The consent decree also becomes the means by which professional proponents advance their own cause, often at the expense of the cause of their clients. The attraction of a monitored settlement, with attendant fees to the client attorneys, thus becomes more valuable to the claimants than obtaining benefits through the political process.

CONCLUSION

There is no doubt that consent decrees afford substantial and important remedies. In various ways they offer genuine promise for a higher quality of justice at a lower cost than the parties could achieve through traditional adjudication. At the same time, their extensive use distorts the role of courts in our society and excuses local government officials from fulfilling the requirements of office. In New York City, consent decrees have moved us one important step away from democracy. We have become paralyzed and unable to sort out the rights of our citizens through the political process.

[53] N.Y.L.J., Dec. 11, 1979, at 10, col. 5 (Sup. Ct. N.Y. County 1979).

In the 1990's, it is clear that timid executive and legislative government is based on fear of fulfilling their responsibilities because of unpopular political positions.[54] We are paying a substantial price in the erosion of the public's faith in our government and its leaders. An additional price we are paying may well be the erosion of public confidence in the judiciary. It leaves us with a massive problem, one with severe and important consequences for our political system.

[54] The current trend of many local and state governments to adopt term limits for legislative members reflects the growing frustration with the direction in which our elected representatives are moving.